NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

No. 18-1091

(Consolidated with 18-1153)

FIRST STUDENT, INC., a division of FIRST GROUP AMERICA,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC, LOCAL 9036,

Intervenor.

On Petition for Review and Cross-Application for Enforcement from an Order of the National Labor Relations Board in No. NLRB-07CA092212.

BRIEF ON BEHALF OF *AMICUS CURIAE* RESTAURANT LAW CENTER IN SUPPORT OF PETITIONER/CROSS-RESPONDENT

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Restaurant Law Center (the "Law Center") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Law Center has no parent company, and no publicly held company has ten percent or greater ownership in the Law Center.

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STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE OF THE *AMICUS CURIAE*[1]

The **Restaurant Law Center (the "Law Center")** respectfully submits this brief as *amicus curiae* in support of Petitioner/Cross-Respondent First Student, Inc., a Division of First Group America ("First Student") in this petition for review.

The Law Center is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing about 15 million people—approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the nation's second largest private-sector employers. The Law Center seeks to provide courts with the industry's perspective on legal issues significantly affecting the industry. Specifically, the Law Center highlights the potential industry-wide consequences of pending cases such as this one, through *amicus* briefs on behalf of the industry.

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[1] Counsel of record received timely notice of the intention to file this brief, and all parties have consented to the filing of this brief. As required by Fed. R. App. P. 29(a)(4)(e), *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

The successorship doctrine of the National Labor Relations Board (the "NLRB") significantly and perhaps disproportionally affects the restaurant industry. Restaurants face chronic staff turnover, as well as the challenges of maintaining a customer base, and providing quality food preparation services. Hence, the Law Center and its affiliates have vital interests in the outcome of these proceedings.

SUMMARY OF ARGUMENT

The United States Supreme Court has long held that when an enterprise purchases a unionized business it is ordinarily free to set initial terms and conditions of employment for the employees it elects to hire. However, the Court has recognized an exception to the general rule if it is "perfectly clear" that the putative successor employer intends to hire all, or substantially all, of the predecessor's employees. In that event, the putative successor must continue to apply the existing terms and conditions of employment until it bargains new terms with the union representing the employees.

For decades, the NLRB interpreted this aspect of the successor employer doctrine to apply only where the new employer had misled employees into believing they would be retained without change in their working conditions, or at least where the new employer had failed to clearly announce its intent to establish a new set of conditions prior to or simultaneous with inviting the predecessor's

employees to accept employment, see *Spruce Up Corp.*, 209 NLRB 194 (1974) enf'd., 529 F.2d 516 (4th Cir. 1975).

In recent years, the NLRB has expanded the scope of this so-called "Spruce Up" exception. As this case and its precursors demonstrate, the NLRB's newly fashioned emphasis on the employer's expression of an intent to hire substantially all of the predecessor's employees has recast the Spruce Up exception as a rule. Due to this expansion, putative successor employers face an untenable choice – either they risk losing key managers and staff to other competing enterprises during the transition, or they significantly reduce operational flexibility by adopting existing terms and conditions of employment.

The Restaurant Law Center proposes that the Court adopt the following restated standard (the "perfectly clear" exception) for successor employer situations in a unionized environment:

A successor employer to a unionized enterprise is free to set initial terms and conditions of employment for its employees unless it is perfectly clear that the new employer plans to retain all of the employees in the unit. This "perfectly clear" exception is narrowly restricted to circumstances in which the new employer has:

1. Materially misled employees by unconditionally announcing that it will continue their employment under the existing terms and conditions of employment; or

2. Failed to establish new terms and conditions of employment prior to or contemporaneously with making an offer of employment to all or substantially all of the predecessor's employees.

ARGUMENT

I. THE "PERFECTLY CLEAR" DOCTRINE IS AN EXCEPTION NOT A RULE

A. The Original Scope of the "Perfectly Clear" Exception was Exceedingly Narrow

In *NLRB v. Burns International Security Services*, 406 U.S. 272, 294 (1972), the Supreme Court enunciated the principle that, "a successor employer is ordinarily free to set initial terms on which it will hire employees of the predecessor" without first bargaining with the employees' bargaining representative. However, the Supreme Court recognized an exception to that principle in "instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." *Id*. at 294-295.

In *Spruce Up Corp.*, 209 NLRB 194 (1974), enf'd., 529 F.2d 516 (4th Cir. 1975), the Board considered the scope and underlying policy considerations of the

"perfectly clear" successor exception and determined it should be restricted only to circumstances in which:

> the new employer has either actively, or by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

Spruce Up, 209 NLRB at 195 (footnote omitted).

According to the Board, a less restrictive interpretation would "encourage employer action contrary to the purposes of this Act and lead to results which we feel sure the Court did not intend to flow from its decision in *Burns*." *Id.* To illustrate this point, the NLRB described a possible contrary interpretation. In the NLRB's view, an employer,

> would, under any contrary interpretation, have to refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms, a right to which the Supreme Court attaches great importance in *Burns.* And indeed, the more cautious employer would probably be well advised not to offer employment to at least some of the old work force under such a decisional precedent. We do not wish—nor do we believe the Court wished—to discourage continuity in employment relationships for such legalistic and artificial considerations.

Id. at 195.

In the ensuing decades, the D.C. Circuit has consistently recognized the importance of maintaining a narrow application of the "perfectly clear" successor exception. *See* e.g., *S&F Mkt. St. Healthcare LLC v. NLRB*, 570 F.3d 354, 359

(D.C. Cir. 2009) ("The 'perfectly clear' exception is and must remain a narrow one because it conflicts with the 'congressional policy manifest in the Act . . . to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantages to be set by economic power realities."); *International Ass'n. of Machinists & Aerospace Workers v. NLRB*, 595 F.2d 664 (D.C. Cir. 1978); *Ridgewell's, Inc.*, 334 NLRB 37 (2001), enf'd., 38 Fed.Appx. 29 (D.C. Cir. 2002).

II. AN EXCEPTION THAT SWALLOWS A RULE IS NOT AN EXCEPTION

A. The NLRB Has Turned the *Burns* Presumption on its Head

Despite its detailed reasoning and approval from the courts for applying the "perfectly clear" exception narrowly, the Board has not done so and instead has significantly expanded its application and stated that it is no longer limited "to situations where the successor fails to announce initial terms *before extending a formal invitation to* the predecessor's employees to accept employment." *First Student, Inc.*, 366 NLRB No. 13, slip op. 3 (2018) (quoting *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip. op. 5-6 (2016). According to the Board majority, relying on recent decisions, a successor employer's bargaining obligation is triggered when it "express[es] an intent" to retain the predecessor's employees without making it clear that employment will be conditioned on acceptance of new terms."

(*First Student, Inc.,* supra. quoting *Nexeo Solutions, LLC,* supra.) The Board has restated the "perfectly clear" exception standard as follows:

> To avoid 'perfectly clear' successor status, a new employer must clearly announce its intent to establish a new set of conditions prior to, or simultaneously with, its expression of intent to retain the predecessor's employees.

(*First Student, Inc.,* supra. quoting *Nexeo Solutions, LLC,* supra.).

The newly propounded "expression of intent" test creates an untenable tension between the precise and narrow concept of a "perfectly clear" plan and the decidedly amorphous concept of "intent." The phrase "expression of intent" introduces an element of ambiguity into the test, for rarely is an expression of intent "perfectly clear" in either an evidentiary or a practical sense. Expressions of intent can be, and frequently are, equivocal or conditional. The introduction of equivocality of intent is the antithesis of "perfectly clear."

In *Burns,* the Supreme Court created a presumption that a successor employer may set initial terms and conditions of employment free of the constraints imposed by a collective bargaining agreement. Application of the NLRB's new "expression of intent" test mitigates that presumption. The NLRB's "expression of intent" test turns the presumption on its head. The test embodied in the language quoted above, presumes that the employer intends to retain the employees of the predecessor. Effectively, the NLRB now requires an employer to avoid the label of a "perfectly clear" successor by proving it did not intend to hire

the predecessor's employees.

Recent cases clearly demonstrate the vice inherent in the NLRB's approach. Over vigorous dissents, the majority opinion in these cases rely on gossamer-thin evidence of "intent." The NLRB has been willing to divine a putative successor's intention to hire the predecessor's employees from such secondary sources as the purchase agreement between the parties to the transaction (*Nexeo Solutions, LLC*, 364 NLRB No. 44 (2016)); testimony of the predecessor employer; and comments made at a school board meeting one month before the putative successor employer made formal employment offers to the predecessor's employees (*First Student, Inc.*, 366 NLRB No. 13 (2018)).

The NLRB purports to be guided by the premise that employees should not be misled by a putative successor's disingenuous assurances of continued employment. Yet, in recent cases, the NLRB has focused less on the impact of communications between the putative successor and the predecessor's employees than it has on tangential matters. In this case, the NLRB dismissed as belated the employer's offer to the predecessor's employees of new terms and conditions of employment despite the offer coinciding with the formal offer of employment. In so holding, the NLRB failed to heed this Court's admonition that, "*Burns* was not meant to force an employer 'to refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right

to unilaterally set initial terms" (*S&F Mkt. St. Healthcare LLC v. NLRB*, 570 F.3d 354, 360-361 (D.C. Cir. 2009).

In its zeal to protect the predecessor's employees from becoming sanguine about their prospects of continued employment with the putative successor, the NLRB has disturbed the balance between the employee's interests and the putative successor's interests in maintaining flexibility. In the process, the NLRB has lost sight of the presumption in *Burns* that the successor employer has the right to set initial terms and conditions of employment in all but the narrowest of circumstances. The NLRB has once again allowed the *Burns* exception to swallow the rule in a manner directly contrary to this Court's admonition in *S&F Mkt. St.*

B. The "Perfectly Clear" Exception Should Not Be a Snare for the Unwary Employer.

The "perfectly clear" exception should apply only when there is a perfectly clear plan to retain employees. The phrase "perfectly clear" carries with it the implication of emphasis. The Supreme Court could have elected to express the standard in terms of a "clear" expression. Instead, the Court inserted the more precise modifier "perfectly." Presumably, the Court's choice has meaning. By definition, something cannot be "perfectly clear" if it is subject to any degree of ambiguity. The concept of "intent" introduces an element of ambiguity. The *Burns* Court decided a bright line test was in order; the NLRB's recent decisions

have ignored that test. In the process, the NLRB has laid a trap to ensnare the unwary employer.

Recent cases, including the instant case, make clear that the NLRB begins its review of successor employer scenarios with the premise that the putative successor intends to hire the predecessor's employees. It then parses the facts for evidence that the putative successor expressed a willingness to hire the predecessor's employees, *see Nexeo Solutions, LLC*, 364 NLRB No. 44 (2016). In its view, such an expression of willingness is tantamount to the "unconditional retention announcement" relied upon by this Court in *International Ass'n. of Machinists & Aerospace Workers v. NLRB*, 595 F.2d 664, 674 (D.C. Cir. 1978). Yet a "plain meaning" comparison of these two standards demonstrates that the latter is faithful to the concept of "perfectly clear" expressed in *Burns*, while the former is not. An unconditional announcement by definition is "perfectly clear." An "expression of willingness" may be verbal or nonverbal, communicated directly or indirectly, or evidenced by conduct. It may be a wink, or failure to respond to an email or voicemail message. Thus, the NLRB's reliance on the *Machinists* case in formulating its standard is misplaced.

The proper inquiry in these cases should start from the premise that the employer has the right to set new terms and conditions of employment. The analysis then should move to an inquiry into whether the employer unconditionally

announced that it would retain the employees of the predecessor. If not, the inquiry should end, and the employer should be accorded its rights under *Burns*. However, even if the employer makes an unconditional announcement that it will retain the predecessor's employees, it still may contemporaneously (or earlier) announce that it is offering new and different terms and conditions of employment than the predecessor. If it makes such an offer in timely fashion, it may still hire employees based on the new and different terms and conditions of employment.

This formulation is consistent with the Court's approach in both the *Machinists and the S&F Mkt. St.* cases. Moreover, the formulation resolves the temporal anomalies presented by this case. Employers would no longer be "straitjacketed" by positive early expressions of future job prospects to the predecessor's employees. So long as these positive early expressions are conditional, the employer would retain flexibility to adjust its formal offer to potential employees to account for the myriad of unanticipated challenges that may arise in a successor employer context.

This formulation also would provide employees with a measure of confidence without impeding their ability to make reasoned choices about their future employment. Either employees will receive an unconditional commitment to future employment with the putative successor or they will not. If they do receive an unconditional commitment, either they will be offered new terms of

employment or they will know they would be working under existing terms. Employees will not be left guessing about the putative successor's true intentions. This Court's concern expressed in the *S&F Mkt. St.* case that the *Burns* exception should not be applied for "legalistic and artificial considerations" will be vitiated, *S&F Mkt. St.*, supra. at 360-361.

III. THE NLRB'S "EXPRESSION OF INTENT" STANDARD IS AT ODDS WITH FUNDAMENTAL POLICY CONSIDERATIONS OF THE SUCCESSORSHIP DOCTRINE

A. The Standard Destabilizes the Balance of Interests

Turnover is endemic to the restaurant business. At any one time, the restaurant population in the United States exceeds one million. Yet the annual turnover rate for restaurants is an astounding 62%. As noted, restaurants face a constant challenge of staff turnover, maintaining a customer base, and providing services in the form of quality food preparation. Thus, the NLRB's successorship doctrine has as great or greater an impact on the restaurant industry as any other.

The balance of interests recognized in *Spruce Up* plays out in virtually every restaurant successorship transaction involving a unionized restaurant. For unionized employees the interests have a dual aspect. First, the employees are interested in the prospect of continued employment or the need to find alternate employment. Second, the employees are interested in the changes new ownership

may foster. At bottom, employees hope for continued employment on the same or better terms. They seek to preserve the benefit of the collective bargaining efforts their union has expended on their behalf. An element of uncertainty necessarily accompanies the process; and employees seek certainty. As the representative of these employees, the union seeks certainty as well.

The new employer's interest is frequently to infuse new life in a moribund business. Restaurants may turn over for a variety of reasons but rarely does turn-over involve a successful going concern. Therefore, new owners are interested in containing costs including labor costs, retaining talented and irreplaceable staff, and maintaining flexibility in business operations. Since unexpected challenges are a part of any turn-over transaction, flexibility is particularly important. Unexpected costs in other areas can negatively affect a new employer's budget for labor.

The NLRB's formulation of the *Burns* standard, as amplified by *Spruce Up*, carefully harmonized these interests. *Burns* left to the new employer the decision of what initial terms and conditions to offer with one exception. If a successor employer makes an unequivocal decision to retain the unionized predecessor's employees without new terms and communicates that decision to employees, it is constrained to retain initial terms and conditions of employment applicable to those employees. The doctrine assuaged the concern expressed by the NLRB in *Spruce*

Up that employees could be misled into believing their collectively bargained terms would remain in place, thus forestalling a search for other work, only to have the new employer change those terms at formal hiring.

However, a successor employer could maintain flexibility in operations by declining unconditionally to offer employment to the predecessor's employees. The new employer could instead offer new terms and conditions to all applicants for employment including employees of the predecessor either at the time it made a formal offer of employment or at the time it extended an invitation to apply for work to the employees of the predecessor.

The NLRB's departure from the principles of *Burns* and *Spruce Up* disrupts this delicate balance and impedes the interests of both employers and employees. Employees suffer because the current approach dissuades successor employers from communicating at all with the predecessor's employees. Employers justifiably fear that any stray remark intended to allay the concerns of the predecessor's employees could be construed as an expression of intent to hire the predecessor's employees. This was precisely the concern expressed by this Court in *S&F Mkt. St.* supra. at 359.

In practical effect, the interaction between the new employer and the predecessor's employees devolves into a game of "gotcha." The employee dissects every communication from the putative successor with an eye toward labeling it as

a "perfectly clear" successor deprived of the opportunity to set different initial terms and conditions of employment. Meanwhile, the new employer remains mute until it is prepared to hire or to offer applications for hire to potential employees, and hopes that the best of the predecessor's employees do not migrate to other restaurants.

B. The Standard Discourages Revival of Failing Businesses.

Left unchecked, the NLRB's current approach to the successor employer doctrine will impede the sale of unionized restaurants as going concerns. The recent cases present potential successor employers with a Hobson's choice: either risk losing key managers and staff to other restaurants during the transition, or eliminate operational flexibility by adopting existing terms and conditions of employment.

Since one principal cause of restaurant failure can be excessive labor costs, the putative successor is left without a practical option. He must either forego the transaction or risk losing valuable staff. Indeed, the loss of any irreplaceable staff could result in a failed transaction in any event. Thus, a test which converts a positive expression of support for retaining existing staff to an "expression of intent" to hire all existing staff is ultimately unworkable.

IV. THE COURT SHOULD RESTATE THE STANDARD IN A MANNER CONSISTENT WITH *BURNS.*

A. The Proposed Restated Standard

In order to return the successorship doctrine to the principles enunciated in *Burns* and amplified by the NLRB in *Spruce Up*, we respectively urge the Court to adopt the following formulation:

A successor employer to a unionized enterprise is free to set initial terms and conditions of employment for its employees unless it is perfectly clear that the new employer plans to retain all of the employees in the unit. The "perfectly clear" exception is narrowly restricted to circumstances in which the new employer has:

1. Materially misled employees by unconditionally announcing that it will continue their employment under the existing terms and conditions of employment; or

2. Failed to establish new terms and conditions of employment prior to or contemporaneously with making an offer of employment to all or substantially all of the predecessor's employees.

B. Application of the Restated Standard Requires Denial of Enforcement of the Board's Decision and Order.

The NLRB's decision concedes that First Student established new terms and conditions of employment prior to or contemporaneously with its offer of

employment to the bargaining unit employees. *First Student Inc.*, 366 NLRB No. 13 at slip op. 2 (2018). Moreover, First Student never unconditionally announced it would continue their employment under the existing terms and conditions of employment. Therefore, if the Court adopts the restated standard proposed here, it should deny enforcement of the NLRB's Order.

CONCLUSION

For the foregoing reasons, this Court should grant First Student's Petition for Review, and deny enforcement of the NLRB's Order.

Respectfully submitted,

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Certificate of Compliance
With Type-Volume Limitation, Typeface Requirements, and
Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains 3,704 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Professional Plus Edition 2016 in 14 point Times New Roman font.

/s/ Robert S. Seigel
Robert S. Seigel

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 13th day of November 2018, he caused the foregoing "Brief on Behalf of *Amicus Curiae* Restaurant Law Center in Support of Petitioner/Cross-Respondent" to be electronically filed using the Court's CM/ECF system, which served a copy of the document on all counsel of record on the case.

/s/ Robert S. Seigel
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